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09/437,535 11/10/99 BREED

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PM82/0312

EXAMINER

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Paper No. 14

Application Number: 09/437,535
Filing Date: November 10, 1999
Appellant(s): BREED ET AL.

MAILED

MAR 12 2001

GROUP 3600

Brian Roffe
For Appellant

EXAMINER'S ANSWER

This is in response to appellant's brief on appeal filed January 19, 2001.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

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(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

The grouping of the claims contained in the brief is correct.

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

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✓5,222,761	<i>Kaji et al</i>	06-1993
✓5,071,160	<i>White et al</i>	12-1991

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-3, 7-8, 10-12, 16-22, 24-25, 28-30, 32-33, and 36-40 are rejected under 35 U.S.C. 103 (a). This rejection is set forth in prior Office Action, Paper No. 9.

(11) Response to Argument

I. Examiner Note

Although the claims recite "means for" language, the examiner interprets the claim to not invoke 35 U.S.C 112 6th paragraph since applicant has not even address or argued the issue.

II. Issue 1

In response to appellant's arguments with respect to the rejection of process claims 20-22, 24-25, 28-30, 32-33 under 35 U.S.C 102 (b) as anticipated by Kaji et al, the examiner respectfully disagrees since the previous Office Action, Paper No. 9, item 4 and 5 clearly show "claims 20-22, 24-25, 28-30, 32-33 under 35 U.S.C 102 (b) as anticipated by Kaji et al or, ***in the alternative under 35 U.S.C 103 (a) as obvious over Kaji et al in view of White et al***" and further "***even if not anticipated***, it would have been obvious to one having ordinary skill in the art at the time the invention was made

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to modify White et al to include the claim method". Furthermore, section 2113 of MPEP stated that :

"when the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claimed in a product-by-process claim, a rejection based alternatively on either section 102 or section 103 of the statute is eminently fair and acceptable."

Therefore, applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In response to applicant's argument on paragraph 3-4 that "Kaji et al does not disclose any sensor or other means for determining the position of the occupant, e.g, a wave-receiving transducer", the examiner takes the position that Kaji et al in combine with White et al do show a sensor for determining the position of the occupant by means of a wave receiving transducer fig. 1 of White et al shows a means for determining (24) the occupant position having an ultrasonic transducer (26).

As to paragraph 5-9, applicant's argument that "Kaji et al. mentions a sensor 33 for detecting a condition that the airbag should not be operated,....it clearly is not an occupant presence determination sensor nor would it be obvious to make sensor 33 an occupant presence determination sensor", the examiner takes the position that Kaji et al disclose method for deployment of the side airbag except for the method for determining position of occupant being arrange in the door of the vehicle, White et al teaches the method for determining position of occupant being arrange in the instrument panel, it would have been obvious for one having ordinary skill in the art to combine the side

airbag deployment of Kaji et al as shown in fig. 6 with the teaching of White et al by arranged the means for determining position of the occupant as taught by White et al into the door of Kaji et al in order to protect occupant inside the vehicle during a lateral directional collision such as when the doors of the vehicle are impacted.

III. Issue 2

Applicant's argument that "it would not have been obvious to one having ordinary skill in the art at the time the invention was made to modify White et al to include all of the steps of the method claims 20-22, 24-25, 28-30, 32-33 because White et al does not disclose an essential part of the structure of the embodiments of the invention set forth in these claims" in the first paragraph of issue 2 in the Appeal Brief, Examiner respectfully disagrees since the rejection of claims 20-22, 24-25, 28-30, 32-33 on page No. 4 of the final rejection (Paper No. 9) which show the claims are rejected based on Kaji et al in view of White et al, while applicant's arguments against the references White et al individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In response to applicant's argument in second paragraph under Issue 2 of the Appeal Brief that "White et al does not disclose a side airbag....the limitation of the deployment control method being for a side airbag", the examiner again deems this to be irrelevant, since the final rejection did not rely White et al as primary prior art, instead

of using method of determine occupant inside vehicle as taught by White to combine with the method for deployment the side airbag as disclosed by Kaji et al.

As to paragraph 3-4 of issue 2 in page No. 8 of the Appeal Brief, applicant's argument that "modification of the system of White et al for use with a side airbag would fundamentally alter the essence of the White et al invention and therefor would not be obvious to one skill in the art" the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the method of determining position of the occupant inside vehicle as taught by White et al is clearly disclosed in col. 4 and 5, one skill in the art would use this teaching to combine with the method for deployment of the side airbag as disclosed by Kaji et al in order to protect occupant inside the vehicle during a lateral directional collision such as when the doors of the vehicle are impacted.

IV. Issue 3

a. Claims 1-3, 7-8, 10-12, 16-19 and 36-40

As to paragraph 1 of the issue 3 in page No. 9 of the Appeal Brief, applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it

takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

As to paragraph 2-5 of the issue 3 in page No. 9 of the Appeal Brief, applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, it would have been obvious to one having ordinary skill in the art to substitute the sensor 33 of Kaji et al by the occupant position detection device as disclosed by White et al in order to observe changes in the sensed positions of the passenger over time or adjust the response level of the restraint so as to provide maximum protection for the occupant upon ultimate deployment thereof, given occupant position within the vehicle.

b. Claim 1

As to paragraph 6 of the issue 3 in page No. 10 of the Appeal Brief, applicant's argument that "in the absence of motivation, as well as the absence of any suggestion in White et al to apply the system described therein for use with the side airbag, it would

not have been obvious at the time the invention was made to modify a vehicle having an arrangement of Kaji et al to include determining means for determining the position of at least a part of an occupant and a control circuit for controlling deployment of a side airbag based on the determined position of the occupant", the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985).

c. Claim 10

As to paragraph 8 of the issue 3 in page No. 10 of the Appeal Brief, applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., a wave-receiving receiver) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

d. Claim 40

As to paragraph 7 of the issue 3 in page No. 10 of the Appeal Brief, applicant's argument that White et al does not teach or suggest using at least two cooperating components to determine whether an occupant is present in the seat ", it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not,

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then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, White et al directly discloses at least two cooperating components (26, 36) to determine whether an occupant is present in the seat (see col. 4, paragraph 4).

V. Conclusion

Claims 1-3, 7-8, 10-12, 16-22, 24-25, 28-30, 32-33, and 36-40 are unpatentable over Kaji et al in view of White et al. Motivation to combine the references is directly disclosed.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Toan C To
Examiner
Art Unit 3619

TTo
March 11, 2001

Conf. (EC):

Conf. (KH):

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